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IN THE

SUPREME COURT OF THE UNITED STATES

No. 979

LANG KINSEY,
Petitioner,

vs.

FLOYD HUGGINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

PETITIONER LANG KINSEY respectfully submits this his Petition for a Writ of Certiorari to be issued to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, to review the judgment of that Court in this cause, being Cause No. 14,573 on the docket of said Court.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is reported in Volume 414, at pages 208-210, of the Southwestern Reporter, Second Series, of the West Publishing Company, and a copy thereof is appended hereto as Exhibit I.

The said Court did not write an opinion in connection with its overruling of Petitioner's Motion for Rehearing. There were no opinions written in connection with the refusal of the Supreme Court of Texas to review the judgment of the said Court of Civil Appeals, or in connection with the overruling of Petitioner's Motion for Rehearing in the Supreme Court of Texas. The trial court's judgment was not reported.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Respondent attacked a judgment obtained against him by Petitioner in the District Court of Texas, asserting as the basis for his attack a right, privilege, or immunity guaranteed him by the Fourteenth Amendment to the United States Constitution. Respondent there contended that the trial court's judgment based upon personal service of a non-resident notice upon him, a non-resident of Texas, outside of the State of Texas, in a personal action against him arising out of his tortious operation of an automobile upon the highways of the State of Texas, was invalid under the holding of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878) (Tr. B-1).

The said Court of Civil Appeals upheld Respondent's contention, and set aside the trial court's judgment by its judgment made and entered on the 22nd day of March, 1967 (Tr. F-1). Petitioner's Motion for Rehearing was overruled by said Court by its Order made and entered on the 19th day of April, 1967 (Tr. F-1).

Petitioner's Application for Writ of Error to the Supreme Court of Texas to review the action of the Court of Civil Appeals was refused by Order made and entered on the 27th day of July, 1967. Petitioner's Motion for Rehearing addressed to the Supreme Court of Texas was overruled by Order made and entered on the 4th day of October, 1967 (Tr. I).

Petitioner believes that jurisdiction is conferred on the Honorable Supreme Court of the United States by Title 28 U.S.C.A., Sec. 1257, Sub-paragraph (3).

THE QUESTIONS PRESENTED FOR REVIEW

Did the state appellate court correctly interpret and apply the law relating to the right, privilege, or immunity claimed by Respondent under the Fourteenth Amendment to the United States Constitution?

Did the state appellate court err in holding that the Fourteenth Amendment to the United States Constitution prevented the Texas trial court from obtaining personal jurisdiction over Respondent by means of a non-resident notice personally served upon him outside of the State of Texas in a suit arising out of his tortious operation of an automobile on the highways of the State of Texas, whereby personal injury was caused to Petitioner, a Texas resident?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Constitution, U. S. Code, Vol. 1, p. xlvii.

STATEMENT OF THE CASE

Petitioner sued Respondent and others in the District Court of Kimble County, Texas, for his personal injuries and damages allegedly caused by the collision of a car driven by Respondent and one driven by another person, which collision occurred in said County, Texas (Tr. A-2, 3, 4), Petitioner alleged therein that Respondent's negligence proximately caused the collision and his resulting injuries. Respondent was personally served on April 18, 1966, by a Kansas Deputy Sheriff in Kansas, where he resided at the time, with a Non-Resident Notice issued under the authority of Rule 108, Texas Rules of Civil Procedure (Tr. A-12, 12a). A copy of Petitioner's petition commencing the suit was attached to the Non-Resident Notice (Tr. A-12a). Respondent filed no answer and made no appearance, and Petitioner in due and proper time, form and manner on May 31, 1966, was granted a default judgment against him (Tr. A-15). After the time for appeal from the said judgment had expired, Respondent in proper time and manner on November 8, 1966, sued

out a Petition for Writ of Error in the trial court (Tr. A-16, 17), and thereafter on December 12, 1966, filed his Brief with the Court of Civil Appeals detailing the alleged error of the trial court (Tr. B).

The Federal question involved was first raised by Respondent in that Brief, the opening sentence of which read:

> "This is a case in which a default judgment for $15,000.00 was rendered in the District Court of Kimble County, Texas, against a resident of Kansas based upon service of non-resident notice in Kansas, contrary to principles established nearly one hundred years ago in Pennoyer v. Neff. It is to correct this patent error that this case comes before this court on writ of error pursuant to Articles 2249, 2249a and 2225, VACS, and Rules 359-363, TRCP." (Tr. B-1).

The Brief contained three Points of Error, to wit:

> "ONE
>
> The trial court erred in rendering judgment against appellant because no valid process was ever issued or served upon appellant.
>
> TWO
>
> The trial court erred in rendering judgment against appellant because the court did not acquire jurisdiction over the person of appellant by reason of the 'Non-Resident Notice' served upon appellant.
>
> THREE
>
> The trial court erred in rendering judgment against appellant because the court had no jurisdiction over the person of appellant and therefore no power to render any judgment against appellant."

Discussion in the Brief was confined solely to the Federal question stated above (Tr. B-1 thru 8). Respondent's "Argument and Authorities" in said Brief consisted of a regime of *Pennoyer* v. *Neff* and quotations therefrom, and citations to several cases which followed and relied upon *Pennoyer* v. *Neff*, and included the following argument:

> "Thus, ever since the historic decision of Pennoyer v. Neff, it has been the law of this as well as every other state in the Union that in an action in personam the process of a state's tribunal has no legal effect upon a non-resident when served upon him beyond borders of that state. In such a case the process must be personally served upon the defendant (or his duly authorized agent for service of process) within the borders of the state by whose court the process is issued. Otherwise, the process, even though personally delivered out of the state to a nonresident defendant, is invalid. And, it goes without saying that in such an action a court has no power to render any judgment until and unless it acquires jurisdiction over the person of the defendant by the valid service of process." (Tr. B-6).

The reference to and reliance upon *Pennoyer* v. *Neff* and cases following it made up the total sum and substance of the Argument and Authorities in Respondent's said Brief.

The Court of Civil Appeals in its Opinion upholding Respondent's contention stated:

> "Appellant (Respondent here) contends that the landmark case of Pennoyer v. Neff, 95 U.S. 565, by the Supreme Court of the United States is controlling in this case." (Tr. E-1, App., Ex. I).

The Court of Civil Appeals set aside the trial court judgment, but did not express in its Opinion the grounds

for its decision. Under applicable Texas law, however, the only question before the court was the one presented by Respondent in his Argument and Authorities in his Brief in that Court, namely, the Due Process question under the United States Constitution. Although Respondent's Points of Error in said Brief were possibly broad enough to include other questions, he construed them in his Argument and Authorities as raising and he actually briefed only the Due Process question. Since in Texas state courts points of error not briefed are regarded as waived (4 Tex. Jur. 2d page 166), and since presumably the Texas Appellate Court followed Texas law, under the Brief submitted by Respondent to that Court only one ground of decision was possible if the Court ruled in his favor, i.e., that the trial court judgment was based upon citation or process which violated the Due Process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner's Motion for Rehearing in the said Court of Civil Appeals specifically raised the question that the said Court had misinterpreted and misapplied the Federal Law, and these points were reiterated in his Application for Writ of Error in the Supreme Court of Texas, and in the Motion for Rehearing therein (Tr. G, H, J; Appendix, Ex. IV, V and VI). The said Supreme Court wrote no opinion in connection with its refusal of the said Application or its overruling of the said Motion for Rehearing (Tr. I, App., Ex. III).

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Texas Court of Civil Appeals in this case is not in accord with applicable decisions of the Supreme Court of the United States.

It appears that the effect of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878), which held that the due process clause of the Fourteenth Amendment was violated where a court rendered a personal judgment against a non-resident defendant without having jurisdiction over him, and that it could not acquire such jurisdiction by serving process upon him outside the forum or by publication, has been greatly mitigated by a number of more recent decisions of this Honorable Court, notably *Hess* v. *Pawloski*, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 632 (1927); *Milliken* v. *Meyer*, 311 U.S. 457, 85 L. Ed. 278, 61 S. Ct. 339 (1940); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945); *Olberding* v. *Illinois Central R.R. Co.*, 346 U.S. 338, 98 L. Ed. 39, 74 S. Ct. 83 (1953); and *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

In *Hess* v. *Pawloski*, the Supreme Court held that service of process could be made upon a certain state official, and notice given by mail to a non-resident in his home state, where the forum state had a statute providing that use of that state's highways implied that the non-resident thereby appointed the state official as his agent for service in any case arising out of his operation of a car upon such highways, and that this was sufficient to enable the forum state's court to render a personal judgment against the non-resident.

Milliken v. *Meyer* held that a state can effectively and legally provide for service of citation upon its domiciliaries who are not residing within the state, in an in personam suit, and that such service, so long as it furnishes adequate notice to the defendant, does not offend principles of due process. The notable holding there, so far as the present case is concerned, is that personal jurisdic-

tion was obtained over the defendant through process served upon him outside the state.

International Shoe Co. v. *Washington* involved a suit against a foreign corporation by the State of Washington to enforce the collection of certain statutory payments. The company had no office or place of business in the state, but transacted business there through salesmen who called upon companies within the state. Service of process was made on the company at its office in another state by registered mail, and also upon an agent within the state. The defendant defended on the ground that the process was not sufficient to bring it before the state court, in that it offended "due process". This Court in holding the process to be sufficient, stated:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (326 U.S. at page 316).

Although that case involved a corporate defendant, the language of the opinion does not restrict the holding of the case to such a defendant, and is not based upon the type of defendant.

The court indicated that both forms of notice were sufficient, holding that:

> "It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."

The court held that service of a notice by registered mail met the due process standard.

In the present case, Respondent had actual personal notice of the suit. He was personally served (Tr. A-12a).

In the *Olberding* case, the Supreme Court recognized that the non-resident motorist statutes (as in *Hess* v. *Pawloski*) were based upon a legal fiction, and not really upon physical power over the defendant, stating:

> "It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. See Scott, Jurisdiction over non-resident Motorists, 39 Harv. L. Rev. 563. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests upon the inroad which the automobile has made on the decision of Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, as it has on so many aspects of our social scene." (p. 341).

The *McGee* case, like the present case, involved a decision of Texas courts that a judgment recovered through service of process on an out of state resident was void under the Fourteenth Amendment because it did not give the court jurisdiction over the defendant. There the plaintiff, a resident of California, had sued the Defendant, a Texas corporation, with home office in Texas, in the California courts on a policy of insurance. The De-

fendant had no office, employees or agents in California, and its only contact with that state was that a company which it had taken over had sold a policy of insurance by mail to the Plaintiff. Defendant was not served with process of any sort in California, but rather was served by registered mail at its principal place of business in Texas. Plaintiff took a default judgment in California, and came to Texas and sued on her judgment. The Texas courts all held that the judgment was no good, that it violated the Fourteenth Amendment, and that the process used did not give the California court jurisdiction over the defendant. In ruling for the California plaintiff, this Honorable Court stated:

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non residents." (355 U.S., p. 222).
>
> * * *
>
> "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the state." (355 U.S. at p. 223).

Although in *Hanson* v. *Denckla,* 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958), the Court held in favor of the non-resident defendant (holding that the cause of action was not one which arose out of an act done or a transaction consummated in the forum state), the Court there clarified and reiterated its holdings in some of the previously cited cases, stating:

> "Appellants charge that this judgment is offensive to the Due Process clause of the Fourteenth Amendment because the Florida court was without

jurisdiction. There is no suggestion that the court failed to employ a means of notice reasonably calculated to inform non-resident defendants of the pending proceedings, or denied them any opportunity to be heard in defense of their interests. The alleged defect is the absence of those 'affiliating circumstances' without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction in personam) or affecting interests in property (jurisdiction in rem or quasi in rem)." 357 U.S. 245, 78 S Ct. 1235.

* * *

"In McGee the court noted the trend of expanding personal jurisdiction over non-residents. As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements of personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S 714, 24 L. Ed. 565, to the flexible standard of International Shoe Co. v. State of Washington." U.S. at 250, S. Ct. at 1238.

The Respondent here was personally given the non-resident notice, along with a copy of the Petitioner's petition, in the manner specified by Rule 108, and he has made no complaint that he did not have notice of the suit or an opportunity to defend himself therein. He simply sat back and ignored the Texas proceeding, until after judgment was rendered against him.

Rule 108, Texas Rules of Civil Procedure, reads in full as follows:

"*Rule 108. Defendant Without State.*

Where the defendant is absent from the State, or is a non-resident of the State, the form of notice to

such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be indorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State." Vernon's Annotated Texas Rules, Rule 108.

Rules 99 through 107 deal with citation and the service and return thereof in ordinary cases. The form of the non-resident notice is in substance the same as that of the ordinary citation, and the form of the return is also in substance the same.

Rule 108 is in substance the same, and is derived from, Articles 1230 through 1234, enacted by the Texas Legislature in 1875, three years before the decision in *Pennoyer* v. *Neff*. See Sayles, Texas Civil Statutes.

By its literal terminology, Rule 108 provides method of notice to be used in all cases where the defendant is a non-resident. There are no exceptions and no qualifications. The rule does not describe or list types of cases. It simply provides a method of service wherever out of state service on a non-resident is called for.

We think that it is beyond dispute, therefore, that the notice afforded the Defendant here is as approved by the decisions of the Supreme Court of the United States. Respondent had considerably more than the "minimal contacts" with the forum state set out in the *International Shoe Co.* case, and the form of notice not only was such

as was reasonably calculated to inform Respondent of the existence of the suit against him, it did so inform him. Respondent, in using the highways of Texas, tortiously injured Petitioner. He was sued in the place where the tortious activity occurred, and was given actual notice of the filing of the suit, along with a copy of the petition commencing the suit. He had an ample opportunity in which to file an answer or enter an appearance and be heard, all of which he neglected to do.

Under the cited holdings of this Court, and the factual circumstances of this case, the non-resident notice served on Respondent was in every way sufficient to give the Texas trial court personal jurisdiction over him, and it is in no way violative of the Due Process Clause. We believe the Texas Court of Civil Appeals erred in holding to the contrary.

CONCLUSION

For the foregoing reasons, Petitioner prays the Honorable Supreme Court of the United States to issue a Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and to review the judgment of that Court in this case, and reverse and render the same.

Respectfully submitted,

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